crossing a track obscured by temporary smoke and steam.[135] Such a decision might be unable to withstand analytical scrutiny under prevailing Ohio law. If a passenger expressly assumes the driver's duty to listen for the approach of trains, the passenger then has the same duty as would a driver insofar as there has been an assumption of duty.[136]

Finally, it must be well remembered that the legal principles and standards pertinent to passengers are not inflexible; they have been enunciated by the judiciary in such a manner that if the facts so require they are capable of great breadth and elasticity.

Earl E. Mayer, Jr.

CIVIL PROCEDURE — ESTOPPEL BY JUDGMENT — NEGLIGENCE IN PROPERTY DAMAGE AND PERSONAL INJURY

Plaintiff brought a negligence action for personal injuries against defendants (master and servant) arising from an intersection collision. The defendants' answers contained allegations of general denial, contributory negligence, and the affirmative defense of res judicata in that the present plaintiff had been adjudged negligent in a previous action. The plaintiff's reply in regard to the new matter of res judicata was that the suit referred to by the defendants had been a suit for property damages only and was therefore not res judicata in the present action. The lower courts ruled for the plaintiff. On appeal, *held* reversed. The principle of estoppel by judgment precluded the plaintiff from recovering in the instant case. *Mansker v. Dealers Transport Co.*, 160 Ohio St. 255, 116 N.E. 2d 3 (1953).

The lower courts, in holding that the previous suit for property damages was not binding in the present suit, had relied on language in *Vasu v. Kohlers, Inc.*, 145 Ohio St. 321, 337, 61 N.E. 2d 707, 716 (1945), which stated that "(a)n act of a defendant which might not be regarded as an unreasonable risk as to plaintiff's property, might well be considered an unreasonable risk as to his person." The reversal of the lower courts' decisions in the principle case makes it clear that the above quoted language in *Vasu v. Kohlers, Inc., supra,* will not prevent the application of the principle of estoppel by judgment to ordinary negligence actions such as the principal case. The Supreme Court stated in the principal case at 160 Ohio St. 259, 116 N.E. 2d 6, "The fact that in the former case damage to property was involved whereas in the present case injury to the person is the subject of the action makes no difference; the standards by which negligence is determined are the same in both instances."

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135 Williams v. Railway Co., 27 Ohio Cir. Ct. (1917).

136 Railroad Co. v. Kistler, see note 16, *supra.*

The language quoted previously in *Vasu v. Kohlers, Inc., supra,* was used in that case to support the holding that injuries to plaintiff's property and person constitute two separate causes of action even though both result from the same negligent act of the defendant. This position, which is held by only a minority of the states, is followed in the principal case. A leading case supporting the minority view is *Reilly v. Sicilian Asphalt Paving Co.,* 170 N.Y. 40, 62 N.E. 772 (1902). See Note, 32 YALE L.J. 190 (1922); 64 A.L.R. 670 (1929); 52 AM. JUR. TORTS § 108 (1944); CLARK, CODE PLEADING 488 (2d ed. 1947). Persuasive authority for the language of *Vasu v. Kohlers, Inc., supra,* that there may be two tests of negligence can be found in the Restatement Of Torts, which in considering the factors that determine the magnitude of the risk in negligence actions, states, "As the social value of the interest imperiled increases, the magnitude of the risk which is justified diminishes. Conduct which would create an unreasonable risk of harm to life or limb might be justified if only some property interest of merely dignitary or slight tangible value were imperiled." RESTATEMENT, TORTS § 293, comment *a* (1934).

It is difficult, however, to conceive of an actual negligence action involving injuries to both property and person where a different test would be applied in each cause of action to determine whether a party was negligent. If such an unlikely situation should arise, logic probably would require that the determination of negligence in a property damage action would not be conclusive as to negligence in a personal injury action.

The statement in the principal case is applicable to the great majority of negligence actions in which injuries to both property and person are involved. The test for negligence is normally the same with respect to both property damage and personal injury, and a determination of negligence in an action on one cause of action will be conclusive in an action on the other cause of action. An example is *Fleischer v. Detroit Cadillac Motor Car Co.,* 165 N.Y. Supp. 245 (1917), where the plaintiff had previously recovered a property damage judgment and then had brought an action for personal injuries arising from the same collision. The court stated at page 246, "(The property) judgment is therefore res adjudicata as to the negligence of the defendant."

It is significant that some courts in other jurisdictions have applied the principle of estoppel by judgment or collateral estoppel when one cause of action involved property damage and the other involved personal injury without even mentioning the possiblity of there being two different tests of negligence. *House v. Benton,* 42 Ga. App. 97, 155 S.E. 47 (1930); *Pratt v. Vaughan et al.,* 2 Cal. App. 2d 722, 38 P. 2d 799 (1934); *Winters v. Bisaillon,* 153 Ore.

509, 57 P. 2d 1095 (1936). Likewise, the Restatement Of Judgments does not indicate that it recognizes two different tests of negligence when under the minority view two causes of action have arisen from a single negligent act. According to the Restatement Of Judgments, if plaintiff brings a negligence action for personal injuries, "... and after a trial there is a verdict and judgment for the defendant, and the plaintiff later brings an action for the damage to his property, the prior judgment is conclusive if the same issues are raised." RESTATEMENT, JUDGMENTS § 68, comment c (1942). See also Scott, *Collateral Estoppel by Judgment,* 56 HARV. L. R. 1 (1942).

The result reached in the principal case is logical and desirable and is in accord with the cases in other jurisdictions. A contrary holding would have limited seriously the application of the principle of estoppel by judgment to negligence actions, and would have thereby permitted undersirable re-litigation of the question of negligence.

Charles R. Leech, Jr.

CRIMINAL LAW — ASSAULT AND BATTERY — LIMITS OF PARENTS' AND TEACHERS' AUTHORITY TO INFLICT CORPORAL PUNISHMET

Defendant school principal had good reason to believe an eleven year old pupil while on the way to school had thrown a stone at one of his schoolmates, knocking off her glasses. Relying on this belief defendant spanked the boy with a wooden paddle. The child was an epileptic and his mother testified that after the spanking he had several fits. Defendant was found guilty of assault and battery in municipal court. On appeal to the Court of Common Pleas, *held,* reversed. Although a parent is criminally responsible for immoderate punishment inflicted on his child regardless of motive or malice, mere excessive punishment on the part of a teacher is not sufficient to attach criminal liability in the absence of a showing of malice or that some permanent injury has been inflicted. *State v. Lutz,* 65 Ohio L. Abs. 402, 113 N.E. 2d 757 (1953).

Defendants in this sort of case appear to fall into two categories — parents and those in *loco parentis* (teachers falling within the latter category). There are also two views on what is needed to establish criminal liability — the one, holding the defendant responsible merely for immoderation in administering punishment, and the other, requiring either a lasting injury or that the immoderate punishment be accompanied by malice to attach liability. On the basis of these distinctions it is possible to make four combinations of types of defendant and tests of liability and authority can be cited for each one.

The one approach refuses to distinguish between the parent and one in *loco parentis* and holds both liable if they inflict excessive punishment even though they act in good faith, *Carpenter v. Commonwealth,* 186 Va. 851, 44 S.E. 2d 419 (1947) and this is the majority view. *Carpenter v. Commonweath, supra;* Note, 5 So. CALIF. L. REV. 173 (1931); Note, 34 VA. L. REV. 247 (1948); See Note, 43 A.L.R. 507.

In this connection, the question of whether the teacher's action constituted excessive or immoderate punishment in a given instance is said to be one for the jury, to be determined from all the attending circumstances — the age, size and general conduct of the child, the nature of the particular misconduct, the instrument used for punishment, and the wounds which have been inflicted. *Carpenter v. Commonwealth, supra.* One may again treat both types of defendant identically and not hold either one responsible for an error of judgment, investing both with quasi-judicial powers and limiting criminality to cases where there is malice or permanent injury. *State v. Pendergrass,* 19 N.C. 365, 31 Am. Dec. 416 (1837); *Boyd v. State,* 88 Ala. 169, 7 So. 268 (1889).

If different tests are applied to parent and teacher, it is possible as in the principal case, to hold the parent to a stricter standard, but impose liability on the teacher only if there is malice or a lasting injury. *Holmes v. State,* 39 So. 569 (Ala. 1905). It is equally possible to take exactly the opposite view, as expressed in *Lander v. Seaver,* 32 Vt. 114, 76 Am. Dec. 156 (1859), where the stricter standard is applied to the teacher. Surprisingly, the *Lander* case is cited in the principal case as supporting the rule there applied, but possibly this is because the *Lander* case also holds that there is a strong presumption in favor of the correctness of the teacher's actions, especially if he acted in good faith and without malice.

The rationalizations offered for allowing either parent or teacher greater leeway in enforcing discipline are rather startling and contradictory. On the one hand, it is suggested that the parent's love for his child makes it safe to allow him a greater authority. "The parental power is little liable to abuse, for it is continually restrained by natural affection, the tenderness which the parent feels for his offspring, an affection ever on the alert and acting rather by instinct than reasoning."

"The schoolmaster has no such natural restraint. Hence he may not safely be trusted with all a parent's authority, for he does not act from the instinct of parental affection." *Lander v. Seaver, supra.*

On the other hand, it is said that the teacher is more impartial than the parent. The principal case points out that while a parent

may punish a child for the illwill he bears another member of the family, a school teacher rarely punishes one pupil for the misdeeds of another: "The quasi-judicial capacity of the school teacher punisher is therefore more impersonal and impartial than that of a parent or step-parent punisher."

And in justifying allowing a teacher as great a power as is granted the parent, one case says: "The character and interest of the teacher, combined with the refinement which education gives to the human mind in softening the heart, like parental love, is generally found a sufficient protection for the children." *Commonwealth v. Seed,* 5 Clark 78 (Pa. 1859).

One of the main arguments against adopting a more liberal attitude toward the teacher's behavior than to the parent's is based upon a theory as to the source of the teacher's power. Some courts regard the teacher's authority as a delegation of the parent's power to use corporal punishment to discipline his child. *State v. Pendergrass, supra.* If this is the only source of the teacher's authority, it is argued that the parent can delegate no greater power to the teacher than he himself has. 1 BISHOP, CRIMINAL LAW § 886 (9th ed. 1923). This theory of the source of the teacher's authority is unsatisfactory in that a delegation implies consent and if school attendance is compulsory the delegation, in the individual case, may not be voluntary. See comment, 26 ILL. L. REV. 815 (1932).

The other basis of the teacher's power to inflict corporal punishment is the theory that it is necessary to grant him this power in order to maintain discipline in the school and some cases adopt this justification. *Dodd v. State,* 94 Ark. 297, 126 S.W. 834 (1910). Under this theory there need be no correspondence between the teacher's and the parent's authority.

Ohio, although adopting, in the principal case, the view that the teacher stands in *loco parentis* to his pupils, apparently regards the teacher as a special member of the class. Only in the teacher-pupil cases is lasting injury or malice demanded as a condition to liability. *Martin v. State,* 11 Ohio N.P. (N.S.) 183 (1910), *aff'd without opinion,* 87 Ohio St. 459, 102 N.E. 1132 (1912). Parents and step-parents alike are liable for immoderation in punishing regardless of malice. *State v. Liggett,* 84 Ohio App. 225, 83 N.E. 2d 663 (1948); *Mohr v. State,* 19 Ohio Cir. Ct., N.S., 43 (1908).

The two different tests of liability, which have been so labored over, lead to much the same result in any particular instance. In the cases applying the strict test (no liability for excessive punishment in the absence of malice or permanent injury), malice is often implied from the excessiveness of the punishment, *State v. Koonse,* 123 Mo. App. 655, 101 S. W. 139 (1907). In those applying the more liberal test, there is frequently a strong presumption in favor of

the correctness of the punisher's actions, especially in the absence of malice. *Lander v. Seaver, supra.* As a result, the difference between the two views is not particularly striking.

As long as the teacher is given the privilege to inflict corporal punishment, the limits of his authority must be defined. To the extent that the choice between the rule which imposes liability only where malice or lasting injury is involved and the rule which holds a teacher liable for immoderate punishment without regard to these two factors is of any importance, it seems more reasonable and less involved to hold both parent and teacher liable for excessive punishment and leave it to the jury to determine in any particular case whether the punishment was unnecessary or unreasonable in degree. The desire to refrain from interfering with the family relation and undermining the parent's authority, which operated in so many of the earlier parent-child cases, *State v. Koonse, supra; Commonwealth v. Seed, supra,* is no longer the overriding concern it once was in our society. The concept of a class of excessive and immoderate punishments for which criminal liability cannot attach because they were not maliciously inflicted and no permanent injury was produced is not consonant with modern views, unless "excessive" and "immoderate" are to take on new and much more colorless meanings.

It may well be that in future years, if current trends continue, the privilege at least for teachers will be entirely abolished. Corporal punishment of any sort is considered by some authorities to be out of line with modern theories of education. Falk, CORPORAL PUNISHMENT 139 (1st ed. 1942). It is thought to be appropriate to an authoritarian system and not consistent with our democratic ideas. *Ibid.;* SHEVIAKOV AND REDL, DISCIPLINE FOR TODAY'S CHILDREN AND YOUTH 8-10 (1st ed. 1944). It is further attacked because it may cause resentment and fear in the child — attitudes clearly not conducive to learning. SCHAFFER, THE PSYCHOLOGY OF ADJUSTMENT 176 (1st ed. 1936); COLE AND MORGAN, THE PSYCHOLOGY OF CHILDHOOD AND ADOLESCENCE 143 (1st ed. 1947).

There has been a considerable decrease in recent years in the severity of corporal punishment applied in schools and the frequency with which it is used. FALK, *op. cit. supra,* at 124. However, corporal punishment is far from being abolished in the schools, FALK *op. cit. supra,* at 124. Only in one state has it been abolished by statute — New Jersey. N. J. ST. ANN. tit. 18, c. 19-1 (1903); REMMLEIN, SCHOOL LAW 232 (1st ed. 1950). A few communities have forbidden it by school board regulation. Bd. of Ed. City of N.Y. §90 (15). Although violation of these regulations might lead to a teacher's dismissal, the regulations would probably not cause a stricter rule to be applied in a criminal prosecution than was

already in effect in the courts of that jurisdiction. *Mansell v. Griffin,* [1908] 1 K.B. 947; Note, 1 SYRACUSE L.J. 252. In communities where these regulations are in force or where there is a tacit understanding that corporal punishment is prohibited, the assumption is apparently that the problem of brutal or sadistic teachers can best be handled on an administrative level and that criminal prosecution should be reserved as a last-line of defense in extreme cases.

Marian L. Griffin

EVIDENCE — PHYSICIAN-PATIENT PRIVILEGE — NOT APPLICABLE TO DEATH CERTIFICATE

Plaintiff claimed death benefits under the Workmen's Compensation Act for the death of her husband. The Industrial Commission disallowed the claim on the ground that the death was not in the course of and arising out of employment. Plaintiff appealed to the court of common pleas and had a verdict and judgment which was affirmed by the court of appeals. Defendant claimed the trial court erred in refusing to admit in evidence the official death certificate signed by decedent's attending physician on the ground that it was a privileged communication within Ohio Rev. Code § 2317.02 whereby a physician is not permitted to testify in certain respects concerning a communication made to him by his patient in that relation, or his advice to his patient. Defendant claims the certificate should be admissible under Ohio Rev. Code § 3705.05 which states that a certificate of any death "shall be prima facie evidence in all courts and places of the facts therein stated." Held, *reversed,* and a new trial ordered. The death certificate was admissible as prima facie evidence of the facts therein stated. The statute relating to death certificates is the more recent and since the latter is more "specific" while the older statute is merely general, the specific and more recent enactment must prevail. *Perry v. Industrial Commission,* 160 Ohio St. 520, 117 N.E.2d 34 (1954).

The authorities differ widely on the admissibility of death certificates, such differences arising in part from the state of the statutory law, the nature of the certificate offered, the difference in the factual situation and the fact or matter on which it is offered. See notes, 17 A.L.R. 359 (1922), 42 A.L.R. 1454 (1926), 96 A.L.R. 324 (1935); 46 C.J.S. INSURANCE § 1337 n. 2; 32 C.J.S. EVIDENCE § 638b; 5 WIGMORE, EVIDENCE § § 1644, 1646 (3d ed. 1940, Supp. 1953); 8 WIGMORE § 2385a.

The physician-patient privilege did not exist at common law and hence is a purely statutory device. However, some writers hold that records of births, deaths and marriages, when properly kept

as required by law, have been recognized both in the civil and common law as public records, and, as such, were admissible in evidence for certain purposes. They feel that the requirement of a death certificate comes directly within the police power of the state and is consequently under legislative and not judicial control. 2 JONES, EVIDENCE § 508 (4th ed. 1938).

The requirement of a death certificate and its admissibility as prima facie evidence of the facts stated therein have been codified in many states. Most of the statutes are similar to the one cited in the principal case, making the death certificate only prima facie evidence which is actually nothing more than a rebuttable presumption. *Jones v. May,* 310 Ky. 706, 221 S.W. 2d 617 (1949); *Prudential Ins. Co. v. Tuggle,* 254 Ky. 814, 72 S.W. 2d 440 (1934).

One of the earliest cases dealing with the admissibility under a statute of a death certificate over an objection that it was privileged was *Bozicevich v. Kenilworth Mercantile Co.,* 58 Utah 458, 199 Pac. 406, 17 A.L.R. 346 (1921). There, the plaintiff's son allegedly died from eating impure ice cream manufactured by the defendants. The question arose as to the admissibility of the death certificate as evidence when introduced by defendant. The court held it admissible, stating that since the physician-patient privilege is purely statutory the legislature could and did change the extent of the privilege so as to make the certificate admissible in civil actions.

The courts admitting the death certificate as evidence over the physician-patient privilege argue that the purpose of the privileged communication statute was to protect confidential matters growing out of the relationship of physician and patient. When legislation requires physicians to file death certificates in a public office and makes such certificates public records they are no longer confidential, and consequently there is no reason to treat them as being privileged. *Life and Casualty Ins. Co. v. Walters,* 180 Miss. 384, 177 So. 47 (1937); *McGinty v. Brotherhood of Railway Trainmen,* 166 Wis. 83, 164 N.W. 249 (1917). One case allows the physician to explain the medical terms and the nature of the disease mentioned in the death certificate. *Randolph v. Supreme Liberty Life Insurance Co.,* 221 S.W. 2d 155 (1949), held that since the testimony of the physician making the certificate could not be received in evidence because of the privilege, it would be an inconsistency to admit the death certificate. *Key v. Cosmopolitan Life, Health & Accident Insurance Co.,* 225 Mo. App. 925, 36 S.W. 2d 118 (1937); *contra, Polish Roman Catholic Union of America v. Palen,* 302 Mich. 557, 5 N.W. 2d 463 (1942).

The general rule is then, that where death certificates are made under statutory authority, and under such conditions that their

accuracy in reciting facts contained therein is certain, they may be allowed in evidence. *Ranger, Inc. v. Equitable Life Assurance Society of the United States,* 196 F. 2d 968 (6th Cir. 1952).

Perhaps the best reason for allowing the death certificate to be admitted in evidence is the fact that the physician-patient privilege is supposed to protect the patient against undue publicity of his personal affairs and since this publicity has already taken place, the privilege can now serve only to hinder the course of justice.

Robert Hill

TORTS — NEGLIGENCE — LIABILITY OF CHARITABLE HOSPITAL

A nurse, an employee of a charitable non-profit hospital, injected a foreign substance into the arm of the plaintiff, a paying patient, causing pain and permanent suffering. The plaintiff brought an action against the hospital based on the alleged negligence of the nurse; there was no allegation of negligence in selecting or retaining the nurse nor of administrative negligence such as failure to furnish proper equipment. The trial court sustained a demurrer to the complaint. On appeal the Supreme Court of Washington, *held,* reversed. Charitable non-profit hospitals are liable for injury to paying patient due to negligence of employees. *Pierce v. Yakima Valley Hospital Ass'n.,* 43 Wash. 2d 162, 260 P.2d 765 (1953). This decision reversed a series of cases from 1893 to 1943 holding no liability in such cases.

There is a difference in some respects between the charitable trust and the holding of property by a charitable corporation, but it is not believed that there should be a distinction between the two for tort liability. BOGERT, TRUSTS § 401 (1953). The basic issue in the principal case is whether the law should exempt charities in whole or in part from tort liability to beneficiaries, servants and others on the ground that the public benefit inherent in a charity justifies denying recompense for damage suffered by one individual. The paradoxes of principle, fictional assumption of fact, and confused results characterizing judicial disposition of this problem are vividly portrayed in *Georgetown College v. Hughes,* 130 F.2d 810 (D.C.Cir. 1942). Though courts have been unable to decide this problem uniformly, legal scholars who have treated the problem are harmonious in their criticisms of any rule granting immunity. PROSSER, TORTS 1079 (1941); HARPER, TORTS § 294 (1931); SCOTT, TRUSTS § 402 (1939); BOGERT, TRUSTS § 401 (1953); 10 AM. JUR., CHARITIES § 140.

The general rule that one is liable for tortious conduct and that charity goes only to motive and not to duty was first departed from in this country in 1876. *McDonald v. Massachusetts General Hospital,* 120 Mass. 432, 21 Am. Rep. 529 (1876). The Massachusetts

court held that a charity patient's claim for damages could not be satisfied from private charitable funds. The authority for this rule was dictum in two early English cases which did not deal with tort liability of private charities and which were expressly overruled (1866 and 1871) prior to being cited as authority for the *McDonald* case.

The rationale of the trust fund theory is that if charitable funds are used to satisfy judgments the fund will be diverted from the intended use and thus the fund dissipated. 10 AM. JUR. CHARITIES § 145; SCOTT, TRUSTS § 402 (1939). The logical result of this theory would be immunity as to strangers, paying beneficiaries and in cases of administrative negligence, yet some states supposedly following this theory allow recovery in such cases. *Cohen v. General Hospital Society of Conn.*, 113 Conn. 188, 154 Atl. 435 (1931); *Roberts v. Ohio Valley General Hospital*, 98 W. Va. 476, 127 S.E. 318 (1925).

It is said that charities are immune from tort liability because respondeat superior does not apply where the master receives no gain from the services. *Herans v. Waterbury Hosp. Ass'n.*, 66 Conn. 98, 33 Atl. 595 (1895). This theory is criticized on principles of agency in that liability should be predicated solely on control over employees. *Lichty Carbon County Agr. Ass'n.*, 31 F. Supp. 809 (M.D. Pa. 1940). Inconsistency also invades this doctrine. *Foster v. Roman Catholic Diocese of Vermont*, 116 Vt. 124, 70 A. 2d 230 (1950).

Immunity has also been rested on ground that governmental immunity should apply to charities because they are performing a quasi public function. *University of Louisville v. Hammock*, 127 Ky. 564, 106 S.W. 219 (1907). Courts have generally balked at extending governmental immunity to privately conducted charities. *Cohen v. General Hospital Society of Conn., supra.*

It is sometimes argued that a beneficiary by accepting benefits waives liability, *Winstow v. V.F.W. National Home*, 328 Mich. 488, 44 N.W. 2d 19 (1950), or assumes the risk of negligence. *Sisters of Charity v. Duvelius*, 123 Ohio St. 52, 173 N.E. 737 (1930). These doctrines based on an implied contract have been criticized as fictitious and as being untenable assumptions. 10 AM. JUR. CHARITIES § 145; SCOTT, TRUSTS § 402 (1930); PROSSER, TORTS 1082 (1941).

Some cases indicate that these theories are only theoretical justifications for what various courts feel is sound public policy. *Andrews v. Y.M.C.A.*, 226 Iowa 374, 284 N.W. 186 (1939). The argument is that group rights should be placed before individual rights which result cannot be attained if charity is subject to liability. This theory is followed in many states but there is little agreement as to the extent of immunity. This divergency should not

exist if there is a real basis in fact for the rule. 25 A.L.R. 2d 29, 70 (1952). Some courts have recognized that public policy of today may be opposite to that prevailing in earlier years. *Haynes v. Presbyterian Hospital Ass'n.*, 241 Iowa 1269, 45 N.W. 2d 151 (1950); *Mississippi Baptist Hospital v. Holmes*, 214 Miss. 906, 55 So.2d 142 (1951); *Ray v. Tuscon Medical Center*, 2 Ariz. 22, 230 P. 2d 220 (1951).

No general rule exists today. Eleven states give complete immunity. *Gregory v. Salem General Hospital*, 175 Ore. 464, 153 P. 2d 837 (1944). Fifteen states have partial immunity depending on the victim's status or the nature of the negligence or both, such as liability to servants, *McInerny v. St. Luke's Hosp. Ass'n.*, 122 Minn. 10, 141 N.W. 837 (1913); to strangers, *Simmons v. Wiley Methodist Episcopal Church*, 112 N.J.L. 29, 170 Atl. 237 (1934); or liability for negligence in selecting or retaining employees, *Taylor v. Flower Deaconess Home*, 104 Ohio St. 61, 135 N.E. 287 (1922); or for breach of a statutory duty, *McInerny v. St. Luke's Hospital, supra,* or when engaged in non-charitable activity, *McKay v. Morgan Memorial Co-op*, 272 Mass. 121, 172 N.E. 68 (1930); *Lichty v. Carbon County, Agr. Ass'n., supra;* but maintain immunity for negligence of subordinate employees to a beneficiary even though a paying patient, *Taylor v. Protestant Hospital Ass'n.*, 85 Ohio St. 90, 96 N.E. 1089 (1911). In three states immunity is limited to exempting trust property from execution. *Anderson v. Armstrong*, 180 Tenn. 56, 171 S.W.2d 401 (1943). Sixteen states and the District of Columbia have adopted or tend to adopt total liability. *Ray v. Tucson Medical Center*, 72 Ariz. 22 230 P. 2d 220 (1951). Three states (Montana, New Mexico, and South Dakota) have no reported cases in point. For a collection of these authorities, see note, 25 A.L.R.2d 29, 142 (1952).

Washington prior to the principal case followed a rule of partial immunity holding there was no immunity as to employees, strangers and invitees or to those whose injuries are due to administrative negligence but there was immunity as to paying and non-paying beneficiaries. *Pierce v. Yakima Valley Memorial Hospital Ass'n., supra* at 772. In *Magnuson v. Swedish Hospital*, 99 Wash. 399, 169 Pac. 828 (1918), the court said sound public policy favored immunity because individual hardship was offset by overall stimulation and encouragement given charity by immunity. In a number of cases from 1893 to 1943 the court refused to reexamine its limited immunity rule. However, a 1940 concurring opinion indicated that the rule was an anachronism but that only the legislature should change it. Yet in the principal case, following the trend in other states, the court, in the light of present conditions and thinking, reexamined the factors on which public policy was based and found that if conditions ever justified immunity, they

do not exist today. Because the court had promulgated the rule, the court contended that it as well as the legislature could change or reject it.

The Ohio rule parallels the former Washington rule; immunity in Ohio is qualified and limited. *Esposito v. Stambaugh Auditorium Ass'n.*, 49 Ohio L. Abs. 507, 77 N.E.2d. 111 (1946). There is no immunity for tort as to a stranger and by the same reasoning the rule would prevail as to servants of the charity. *Cullen v. Schmit,* 139 Ohio St. 194, 39 N.E.2d 146 (1942); *Sisters of Charity v. Duvelius, supra.* Charities are liable for negligence in the selection and retention of employees, but otherwise are not liable for negligence of employees to beneficiaries; moreover, it is immaterial that the beneficiary is a paying patient. The basis for this limited immunity lies in considerations of public policy. *Taylor v. Flower Deaconess Home, supra.* Except for dicta in *Pearlstein v. A. M. McGregor Home,* 79 Ohio App. 526, 73 N.E.2d 106 (1947); the cases support the rule that immunity is not lost because the tort is committed during non-charitable activities, such as operating a restaurant or selling religious articles for a profit. *Cullen v. Schmit, supra; Emrick v. Penn. R.R. Y.M.C.A.,* 69 Ohio App. 353, 43 N.E.2d 733 (1942). In other jurisdictions where this question has been considered as a distinct issue immunity has been withdrawn. *Lichty v. Carbon County Agr. Ass'n., supra.* Whether immunity extends to a breach of a statutory duty has not been adjudicated in the Ohio Supreme Court and lower courts do not agree. In *Howard v. Childrens Hospital,* 37 Ohio App. 144, 174 N.E. 166 (1930), immunity was denied due to breach of a statutory duty but in another case where the question was not directly considered immunity was sustained. *Esposito v. Stambaugh Auditorium Ass'n., supra.* The fact that the charity carries public liability insurance does not reflect on liability. *Emrick v. Penn. R.R. Y.M.C.A., supra.*

Due to changes in social and economic conditions, the emphasis on individual rights, insurance coverage, increased size, governmental support of charities, and the fact that charities have survived when subject to full liability, it can be convincingly argued that Ohio should abandon its partial immunity rule. On the other hand it can also be argued that to make charities fully liable would make them susceptible to many unfounded claims. Inevitably all patients do not recover. Negligence in such cases is hard to disprove and true injuries even harder to determine, and in spite of instructions as to burden of proof juries are ready to find for claimants and assess heavy damages. Query whether these arguments are sufficient reasons to deny bona fide claimants the right to present their case to a jury. Precedent must be hurdled. However, the supreme court in 1922 recognized that the rule had its

origin in public policy and that it would in the future be developed, modified or extended as necessities of new social and economic conditions demanded. *Taylor v. Flower Deaconess Home, supra.* The time has come for the rule to be abandoned. Conditions no longer exist to justify the considerations on which the policy argument is based.

Donald W. Wiper, Jr.

WILLS — REVOCATION BY DIVORCE

Action by executor against testator's widow for a declaratory judgment defining the widow's rights under the will. Testator and widow were married in 1898. The will in question was executed in 1937. In 1939 the widow obtained a divorce, the decree containing a fair and equitable division of property amicably arrived at by the two parties. Testator died in 1951 without having revoked the will of 1937. The executor contended that the divorce, with the incidental property settlement, effected an implied revocation of the will as to the widow, relying on Ohio Revised Code, § 2107.33, which provides that "nothing herein contained shall prevent the revocation implied by law, from subsequent changes in the conditions and circumstances of the testator." The probate court held that the will had been revoked by implication as to the widow. The court of appeals reversed, but the Supreme Court reversed the court of appeals, affirming the holding of the probate court. *Younker v. Johnson,* 160 Ohio St. 409, 116 N.E. 2d 715 (1954).

On two previous occasions the Supreme Court of Ohio had faced the problem of the effect of a divorce upon the testamentary bequest of one spouse to the other. *Charlton v. Miller,* 27 Ohio St. 298 (1875), held that the mere granting of a divorce to the husband did not revoke his will leaving property to her. The court distinguished the *Charlton* case from the instant case in two respects: (1) the will was executed prior to the marriage; and (2) there was no incidental property settlement. A subsequent case held that the granting of a divorce coupled with a property settlement did not impliedly revoke the will. *Codner v. Caldwell,* 156 Ohio St. 197, 101 N.E. 2d 901 (1951). The only meaningful distinction raised by the court between the *Codner* case and the instant case is that the will in the former case was executed before marriage, in the latter during marriage. The court did not presume to overrule the previous cases, but disposed of the instant case by distinguishing it from its predecessors. Thus, the holding in the instant case can be narrowly defined as follows: A divorce decree, coupled with a property settlement, impliedly revokes the husband's will as to his wife, if the will was executed during the marriage. Two prior lower court decisions in Ohio are in exact accord. *Pardee v. Grubiss,*

34 Ohio App. 474, 171 N.E. 375 (1929); *Bornheim v. Roesch,* 13 Ohio L. Abs. 180 (1932).

Only twelve states, including Ohio, give statutory recognition to the doctrine of implied revocation. Durfee, *Revocation of Wills by Subsequent Change in the Conditions or Circumstances of the Testator,* 40 MICH. L. REV. 406, 407 (1942). Litigation in these states on facts paralleling those of the instant case has usually been similarly resolved. *Lansing v. Haynes,* 95 Mich. 16, 54 N.W. 699 (1893); *Donaldson v. Hall,* 106 Minn. 502, 119 N.W. 219 (1909); *In re Estate of Bartlett,* 108 Neb. 681, 190 N.W. 869 (1922); *Will of Battis,* 143 Wis. 234, 126 N.W. 9 (1910). See note, 18 A.L.R. 2d 697 (1951). This result is said to be "in accord with reason and justice" in THOMPSON, WILLS (3d Ed.) § 176. But on the other hand it has been argued that the doctrine of implied revocation should not be extended to cover this fact pattern. The dissent in the instant case felt that the doctrine should be confined to its common law scope. The only changes in domestic relations that revoked a will at common law were the marriage of a man, followed by birth of issue, or the mere marriage of a woman. Durfee, *supra,* at 406; 1 PAGE, WILLS (Life-time Ed.) § 508. The danger of contravening the intent of the testator is also raised as militating against the wisdom of implying revocation under such circumstances. PAGE, *supra,* § 522. But notwithstanding these persuasive arguments, Ohio's position clearly meets with the concurrence of cogent authority.

The Ohio court was silent as to whether this particular fact situation effects an irrebuttable revocation. Most courts that have considered this point hold that it cannot be rebutted by evidence of the testator's intent that the bequest remain effective. *Will of Battis,* supra; *In re McGraw's Estate,* 233 Mich. 440, 207 N.W. 10 (1926); *In re Martin's Estate,* 109 Neb. 289, 190 N.W. 872 (1922). Legal writers agree that the revocation is conclusive. PAGE, *supra,* § 522; ROLLINSON, WILLS § 153.

One question remains. Is the distinction between the facts of *Codner v. Caldwell, supra,* and the instant case a vital one, justifying a different result? In both cases there was a divorce with an adjunctive property settlement. But in the *Codner* case the will was executed before the marriage, in the instant case during marriage. In commenting on this distinction, in reference to its suggestion in *Charlton v. Miller, supra,* a legal writer called it "without significance." Evans, *Testamentary Revocation by Divorce,* 24 KY. L.J. 1, 2 (1935). The author was unable to discover any other court which has given operative force to this factual nuance, and is inclined to regard it as without foundation.

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